NO. 47724-6-II Consl.

IN THE COURT OF APPEALS STATE OF WASHINGTON
DIVISION II

TACOMA SCHOOL DISTRICT,

Appellant,

v.

TRUBY PETE, SHELIA GAVIGAN, & KATHY MCGATLIN

Respondents.

REPLY BRIEF OF APPELLANT

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II. ARGUMENT

This matter is pending before this Court because three employees (collectively, "Employees"), for whatever reason, chose to break state and federal law by disclosing statutorily-protected, confidential student records to a third party in violation of District policy and procedure. In efforts to remedy that breach, the Tacoma School District ("District") has asked for the identification of all student records provided to third parties. To avoid accountability for that breach and in an effort to make new law, the Employees argue this is a matter of great legal significance implicating the First Amendment. This case, however, is not one concerning the right to redress grievances or seek legal advice, as allowed by the First Amendment. At no time has the District attempted to stop the Employees from communicating with or seeking the advice of counsel, nor has it done anything to prevent the Employees from accessing the courts or legal process. The District's only concern has been and continues to be, the protection of the personally identifiable information of its students as required by the Family Educational Rights and Privacy Act ("FERPA"). Because neither Washington nor other controlling law supports protecting the purported rights of an employee to unfettered access and use of confidential student records over the rights of students to their privacy, as expressly protected by law, this Court must reverse the writs of certiorari and reinstate the orders denying the motions for protective order.

A. **Employees Misstate and Distort The Record.**

In a bizarre argument, the Employees urge this Court to strike the District's discussions regarding FERPA regulations as improper factual statements, in violation of RAP 10.3. Arguing an interpretation of law, which is cited for this Court's independent review and determination, is not a "factual" statement. By contrast, Employees continue to frame their complaint to the District in August 2014 as a "whistleblower" complaint when, in fact, the record supports the District's conclusion that it was not a whistleblower complaint alleging violation of law, but was, as discussed further below, a grievance with District actions in administrative decision-making and performance evaluations. Response Letter from OCR, CP 56 ("The complaint filed with the District on August 27th does not allege any violations of Title VI, Section 504, or Title II").

Moreover, it is the Employees who have stockpiled their responding brief with improper and material factual assertions that must be stricken from the record and for which sanctions should be imposed. RAP 10.3(a)(5). To wit:

- Asserting repeatedly that the impetus and reasoning behind their unlawful disclosures was "in order to receive full and accurate legal advice." CP 2. This "fact" does not appear anywhere in the record. Further, to the extent Employees urge this allegation is material to this Court's determination of the legal issue before it, then the Employees have waived any attorney-client privilege. If the

Employees are permitted to legitimize the disclosures by relying on their alleged reasons for the disclosures, then the District should be permitted to inquire and verify.

- Claiming that they took their concern to King 5 News after Superintendent Santorno dismissed their complaint and citing CP 145, which does not support this assertion in any manner. Not only does the reference to the record at CP 145 not support this assertion o timeline, the Employees also cite outside the record by referring the Court to a link for the King 5 report that does not include the actual news footage.

Employees also distort the factual background and procedural history by either failing to include material facts or by misrepresenting them:

- The "promise" to sequester offered by then-counsel for the Employees came *after* the District had sent four letters requesting their return, *after* the Employees were served with notice on September 30, 2014, advising them that their conduct may subject them to discipline, and *after* the lawsuit was filed. CP 98, 128-130. The Employees have never disputed that they did not respond to any of these communications until October 1, 2014, *after* the lawsuit was filed. CP 98. See also, Resp. Br. p. 3-4 (neglecting to rebut or refute factual history).
- The discovery the District sought was not limited to Joan Mell but requested, by interrogatory and request for production, Employees to

"identify all student educational records disclosed to third parties." CP 160. It did not specifically ask to whom the records were given. Thus, the request did not seek privileged communication and an answer in the negative or positive did not necessarily implicate the attorney-client privilege.

- Employees reference their complaints filed with PSESD and OCR in such a manner as to disingenuously leave this Court with the impression that the complaints that are being investigated by those agencies were filed prior to the discipline and lawsuit at issue, and were also supported by student records. Resp. Br., p. 19-21. Neither is true.

  The complaint filed with the PSESD was on March 2, 2015, several months after the notices of discipline and after the lawsuit was filed seeking return of the records. CP 544-550. Further and more importantly, review of the unsupported complaint filed with PSESD demonstrates that, not only were student records unnecessary to support the complaint and initiating investigation, but that it is not the same or substantially the same complaint as was submitted to the Superintendent in August 2014. Compare CP 547-50 (in which inflammatory allegations are made with reference to WAC provision) to CP 53-61 (in which Employees complain about Assistant Principal Burke and attempt to frame conduct that underlies their negative evaluations). Thus, not only should the Court dismiss considering the PSESD complaint as justification for disclosures, the complaint

actually proves the District's point: that an alleged "whistleblower" complaint may be made without disclosing student records.

Similarly, OCR's response letter indicates that the complaint received by it is significantly different than the complaint filed with the Superintendent. CP 53-56. In fact, OCR agrees with the District that the complaint filed with the Superintendent was not a legitimate complaint alleging violations of Title VI, Section 504, or Title II, but was a grievance with "District actions in administrative decision-making and performance evaluations." CP 129 and 55-56 ("the complaint filed with the district on August 27th does not allege any violations of Title VI, Section 504, or Title II"). The District wants to be clear that, while concern with alleged disparity may be a legitimate basis for complaint, *that is not what was originally expressed in the complaints to OCR or the District itself.*

Thus, repeated references by the Employees to these two investigations is intended to mislead the Court into believing that the student records at issue somehow supported or are relevant to the initial disclosures or to the administrative agency complaints. They are not and their pendency should not be considered in this appeal.

B. Congress Enacted FERPA to Protect against Disclosures

FERPA was originally enacted as part of the General Education Provisions Act, entitled "Protection of the Rights and Privacy of Parents and Students," and codified at 20 U.S.C. § 1232g. Just as the Health Insurance Portability and Accountability Act ("HIPAA") was later

enacted to protect the privacy and security of medical records and health information, FERPA was enacted, in part, to protect the privacy and security of student information. Both serve to set national standards and process for disclosures. In both cases, employees of covered entities have limited and conditional access to information protected under the laws for purposes of carrying out their employment functions. FERPA (access to school officials who have "legitimate educational interests.") v. HIPAA (access by one or more health care providers for the provision, coordination, or management of health care services). And under both laws, subjects of confidential records protected under the law should and do expect that employees with limited and conditional access will respect the process and not disclose records and information in violation of the laws.

While the Employees urge this Court to give their interest in pursuing a personnel complaint that may or may not at some point eventually be supported with private student records, the District asks this Court to not lose sight of the students whose privacy interests were actually and unnecessarily breached. This is even more so where the Employees' attorneys could have accessed properly de-identified records through a Public Records request under RCW 42.56. In a balancing of interests, there can be no question that both on these facts and generally, the rights of the subjects of these records to be free from breaches of privacy outweigh the interests of an employee to use the records database as a private discovery bank.

C. Employees Continue to Misstate the Holdings in *Martin v. Lauer* and *Jacobs v. Schiffer*

The District incorporates by reference the arguments made in its opening brief, and only adds the following:

As Hearing Officer Fleck noted in her order, *Martin v. Lauer*, 686 F.2d 24 (D.C. Cir. 1982) actually supports the District's argument (CP 152) and *Jacobs v. Schiffer*, 204 F.3d 259 (D.C. Cir. 2000) uses the term "documents," in referencing communications yet does not reconcile how it does so relying exclusively on *Martin*, which only applied to oral communications. CP 153-154.

Further, to the extent this Court intends to apply the analysis in *Jacobs*, these facts do not support granting the employees protection from having to identify the students' records disclosed to third parties. Just as General Counsel Shannon McMinimee referenced in her letter to Joan Mell, the belated offer to "sequester" and "resolve" the issues only came *after* the Employees failed to respond to "each and every communication on the subject between September 3 and 25, 2014." CP 129. The Employees have never disputed this truth. Accordingly, even if this Court were to conclude that *Jacobs* stands for the proposition that on ***good faith representation*** an attorney may unilaterally obtain confidential and statutorily-protected records of a client's employer, on these facts that proposition would be inapplicable. Indeed, it is their abject failure to respond or engage in any fashion that left the district no choice but to pursue action. CP 129 ("While you now espouse to want to

resolve the student record issues without court intervention, your failure to respond in any manner to each and every communication on this subject between September 3, 2014, and September 25, 2014, left the District no choice but to pursue litigation on behalf of the students whose rights were violated by your clients and the programs that have been put at risk of loss of federal funding as a result.").

D. Employees Fail to Rebut that the Balancing of Interests Does Not Fall to Them And Thus That Error Was Shown

Employees claim that the District's interest in protecting the student records is achieved by merely having policies on the books that prohibit disclosure and that an employee's actions in violating FERPA will not be held against the District. CP 22-23. Not only may the actions of its employees be held against the District under the legal concepts of agency and vicarious liability (or *respondent superior*), but if the District does not enforce its policies and procedures, it can be said to functionally not have any policies and procedures. Finally, this Court should not reject the District's clear interest in protecting against disclosures based on the cavalier claim that it is "unlikely" that the District will lose funding considering the "past practices of the federal government." The District has the right to expect its employees to comply with state and federal laws with which it itself is expected to comply.

The Employees' citation to *DeNeui v. Wellman*, 2008 WL 2330953 (D.S.D. 2008), does not change this analysis. In *DeNeui*, a

plaintiff sought to depose the referring physician. The referring physician sought the advice of private counsel to aid in preparation of the deposition. The South Dakota District Court found the physician's right to legal representation outweighed any concern of a breach of the physician-patient privilege due to both the fact that the plaintiff had waived any privilege by putting his state at issue and because the physician may be brought in as a defendant. These distinguishing facts are not at issue here and, in fact, mandate a contrary finding. No lawsuit or other process had been initiated against the Employees for which they required the defense or consultation of counsel. Further, HIPAA, as noted in *DeNeui*, "provides for the disclosure of privileged information for purposes of obtaining legal services." FERPA has no similar provision for individual employees.

Employees confuse the standard of review that Judge Cuthbertson (and this Court) should have applied on consideration of a petition for writ of certiorari. Resp. Br., p. 9. The standard was not whether the court would find differently, or whether in its judgment Washington law should be extended to allow employees of a school district to disclose statutorily-protected, third party documents to a privately retained attorney in violation of state and federal law. The standard, as acknowledged by Employees, is to "correct errors of law." *Devine v. Dep't of Licensing*, 126 Wn. App. 941, 949, 110 P.3d 237 (2005). There can be no finding that the Hearing Officers acted erroneously or "illegally" in the absence of law mandating a different

finding. Employees essentially argue that it was appropriate for Judge Cuthbertson to make new law, despite its lack of clarity, on a petition for writ of review. CP 9. This is not only an improper use of the writ process, it is not supported by the statute's requirement that the error shown must be obvious or probable and not subject to correction on appeal. As such, this Court must reverse the writs and reinstate the Hearing Officers' rulings denying the motions for protective order.

E. No Attorney-Client Privilege

The rationale employed by both Hearing Officers Fleck and Lukens should be applied by this Court to conclude that Washington does not apply attorney-client privilege to the request to identify third-party pre-existing documents that do not contain any communications of or concerning the attorney-client relationship. CP 151 (concluding that "Washington's attorney-client privilege does not protect inquiry into the transmission of these school district records.") and CP 338 (citing *Morgan v. City of Federal Way* and concluding that "any questions regarding the delivery of student records to Ms. Mell or another third party, whether or not redacted, are not covered by the attorney-client privilege."). As argued in the opening brief, this conclusion is supported by not only our Washington State Supreme Court in *Soter v. Cowles Publ'g*, 162 Wn. 2d 716, 745-46 (2007) and *Morgan v. City of Federal Way*, 16 Wn. 2d 747, 755 (2009), but also by the United States Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976).

III. CONCLUSION

For the foregoing reasons and those asserted in its opening brief, the District asks this Court to reverse the erroneous writs granted to the Employees in this case and remand for further proceedings consistent with the hearing officers orders denying the motions for protective order.

RESPECTFULLY SUBMITTED this 19th day of Jan., 2016

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CERTIFICATE OF SERVICE

I, Angela Marino, hereby declare that on this 19th day of January, 2016, I caused a true and correct copy of the foregoing to be served on following in the manner indicated below:

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 19th day of January, 2016, at Seattle, Washington.

Angela Marino
Legal Assistant